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IN THE

# Supreme Court of the United States

KEVIN ADELL,

*Petitioner,*

*v.*

JOHN RICHARDS HOMES BUILDING COMPANY, L.L.C.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF FOR PETITIONER

In its brief in opposition, JRH fails to refute Adell's demonstration of a clear circuit conflict on the question presented. JRH concedes the existence of the evidentiary rule (applied by numerous courts of appeals) that a party with the burden of proof cannot establish an essential fact through the hearsay testimony of an expert. *See* Pet. Opp. 24 ("a proponent of expert testimony cannot rely upon a hearsay fact to establish the truth of the fact through the expert"). Nevertheless, JRH attempts to avoid through evasion the reality that the decision below conflicts irreconcilably with the decisions of other courts of appeals over this very rule. Specifically, JRH attempts to conflate the question presented with the wholly different issue whether an expert may rely on hearsay in forming his or her opinion. That an expert may rely on hearsay in forming an opinion, *see* Fed. R. Evid. 703, and may disclose through testimony the hearsay that he or she relied upon in forming the opinion, *see* Fed. R. Evid. 705, does not relieve the party with the burden of proof of the obligation to establish a relevant fact through appropriate, non-hearsay evidence, *see* Fed. R. Evid. 802. JRH cannot avoid the existence of a clear circuit conflict on the question presented by purposely missing the point.

With regard to Adell's demonstration that the decision below conflicts with prior decisions of this Court and is plainly wrong, JRH says nothing at all. JRH also fails to refute Adell's demonstration that this case presents an ideal vehicle to resolve the conflict over the question presented because the conflict arises squarely in this case and resolution of the conflict is outcome-determinative. Notwithstanding JRH's efforts at obfuscation (in part through its recitation of numerous irrelevant and meritless assertions), the facts necessary to resolve this matter are undisputed (and clearly demonstrated in the record), and may be summarized succinctly as follows:

As the court below acknowledged, JRH had the burden of proving its claim for damages in the form of lost profits. Pet. App. 29a. In order to prove its clam for lost profits, JRH had to demonstrate that it *actually had* the stream of profits that it claims

it lost – i.e., if JRH had no profit stream, then it had no claim for damages arising from the claimed loss of the stream. Frazee (JRH's expert) testified that, *based upon* JRH's historic stream of profits, JRH would likely have had a certain amount of profits in the future. Pet. Opp. 24 ("Frazee used historic sales data from the past five years to estimate future lost profits."). But Frazee had no first-hand knowledge of whether JRH *actually had* a stream of historic profits. Rather, Frazee simply worked from information regarding prior sales and profits that someone at JRH gave him. Apx. 571, 604-07, 609-11, 636-37. Because he acquired the relevant information from someone else, rather than from first-hand knowledge, Frazee's statements concerning JRH's historic profits are classic hearsay. *See* Fed. R. Evid. 801. And JRH never offered at trial any documentary evidence that JRH *actually had* any lost profits, nor did JRH offer a fact witness to fill this void (e.g., no one testified that JRH ever had any historic profits or what they were). Nevertheless, over Adell's repeated objection, the bankruptcy court held Adell liable for millions in damages (far more than Adell's net worth) based on Frazee's testimony. Pet. App. 83a. As a result, JRH has succeeded (so far) in pulling off an evidentiary "fast one" -- i.e., purporting to establish a key factual element of its claim (whether it *actually had* a stream of profits that it claims to have lost) through an expert who had no idea whether the information handed to him was accurate or not. JRH's "fast one" is especially troubling because JRH resisted and failed to disclose in discovery the information that Frazee relied upon, and the evidence suggests that, due to its questionable business practices, JRH was not profitable during the relevant five-year period that JRH used to measure its historic profit stream.[1]

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[1]JRH's recitation regarding its non-disclosure of the relevant materials on which Frazee relied is incorrect. Adell sought discovery of the relevant financial records, JRH objected, and the bankruptcy court refused to require their production. Apx. 94. The month before trial began, however, the court-appointed discovery master directed JRH to produce the financial records. At trial, Adell objected to Frazee's testimony on

Again, contrary to JRH's assertions, the question presented is *not* whether Frazee could rely on the hearsay statements of some undisclosed person in forming his opinion on JRH's anticipated future profits. Rather, the question presented -- and the subject of a split among the courts of appeals -- is whether JRH could rely on Frazee's hearsay statements to establish that JRH *actually had* the stream of profits that it claims it lost. Following the First Circuit's approach, the court below answered "yes." Five other courts of appeals have answered "no." Certiorari is warranted.

### A. The Decision Below Deepens A Circuit Conflict On An Important And Recurring Problem.

As the Sixth Circuit specifically recognized in the decision below, JRH "bore the burden of proving [its claim for damages]." Pet. App. 29a. Yet, expressly following the approach taken by the First Circuit in *International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540 (1st Cir. 1988), the Sixth Circuit ruled that "[h]ad JRH had an independent need to prove the past profits . . ., the present record might be inadequate. However, it did not." Pet. App. 29a. In concluding that JRH properly presented proof of its past profits by offering Frazee's hearsay testimony, the court reasoned that, once JRH offered Frazee's hearsay testimony, the burden shifted to Adell to demonstrate that the information that Frazee relied upon was wrong, and that "an opposing party who would challenge the facts underlying the expert's opinion must do so by cross-examination." Pet. App. 30a Although this conclusion turns the hearsay rule on its head, it is clearly the holding of the Sixth Circuit in this case.

JRH does not deny that the Sixth Circuit reached this legal conclusion. Instead, it theorizes that a conflict among the courts of appeals does not exist for two transparently unsound reasons.

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the ground that the documents still had not been produced. Apx. 582. JRH disputed this. Yet, JRH never introduced any financial records into evidence at trial (which JRH concedes), Apx. 581-85; Pet. Op. at 8, and there is no evidence that the documents were ever produced.

First, JRH attempts to conflate the question presented with an entirely different question -- whether an expert may rely on hearsay in forming an opinion and may disclose through testimony the hearsay that he or she relied upon. JRH asserts that the courts of appeals all agree that, under Rules 703 and 705, an expert may do so, and that it is the burden of opposing counsel to explore and expose any weakness in the expert's opinion through cross-examination. *See* Pet. Opp. 24-25. But JRH's observations are irrelevant to resolution of the question presented. Frazee expressed an opinion regarding JRH's potential future profits based upon information concerning JRH's historic profit stream -- information that an undisclosed person gave to him and that was never itself introduced at trial. The question presented is whether JRH could then rely on Frazee's hearsay testimony regarding JRH's claimed historic profit stream to establish as fact that JRH *actually had* a profit stream to lose. The Sixth Circuit ruled that JRH could do so, holding that Adell had the burden of disproving the facts that Frazee relied upon. As JRH tacitly acknowledges, however, numerous courts of appeals have adopted a contrary rule – i.e., that a party simply cannot rely on such hearsay at all. Thus, a circuit split exists on the question presented and certiorari is warranted.

Certiorari is especially warranted because, as demonstrated by the decision below and the approach taken by the First Circuit in *International Adhesive*, courts often get this wrong. And they get it wrong for the very reason that JRH gets it wrong -- they erroneously confuse the ability of an expert to rely on hearsay in forming an opinion, and to disclose the basis for his or her opinion (including any hearsay on which he or she relied), with the admissibility of the expert's testimony to establish the underlying hearsay as proven fact. As a matter of law, an expert's recitation of hearsay simply cannot establish the hearsay as fact because Rule 802 provides that "[h]earsay is not admissible except as provided by these rules," and Rules 703 and 705 simply do not permit what the Sixth Circuit allowed in this case. As the Seventh Circuit has clearly explained:

> An expert is of course permitted to testify to an opinion formed on the basis of information handed to rather than

> developed by him -- information of which he lacks first-hand knowledge and which might not be admissible in evidence no matter by whom presented. Fed. R. Evid. 703. And in explaining his opinion an expert witness normally is allowed to explain the facts underlying it, even if they would not be independently admissible. But the judge must make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence. . . . If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, "See, we proved X through our expert witness, A."

*In re James Wilson Assocs.*, 965 F.2d 160, 172-73 (7th Cir. 1992); *see also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other admissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. It does not allow the admission of the reports to establish the truth of what they assert."); *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983) ("An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion, Fed. R. Evid. 703, but not as general proof of the truth of the underlying matter, Fed. R. Evid. 802.").

JRH contends that the Seventh Circuit's decision in *James Wilson* is consistent with the result below. JRH is wrong. JRH concedes that, in *James Wilson*, the testifying expert could not be used to prove an essential element of the plaintiff's claim -- the condition of a building -- because the expert's knowledge of the condition of the building was based on hearsay. 965 F.2d at 173. JRH's concession is fatal to its attempt to harmonize the case with the one at bar.

Consistent with *James Wilson* and the Rules of Evidence, Frazee could testify about his opinion on future losses, but could not establish as a fact that JRH *actually had* any historic profits, or what those profits were, because Frazee did not have any first-hand knowledge about them. Nonetheless, the courts below allowed this, and placed the burden on Adell to disprove what Frazee

assumed. This approach clearly conflicts with that taken in *James Wilson*. 965 F.2d at 172-73. As the Seventh Circuit warned, "[t]he fact that inadmissible evidence is the (permissible) premise of the expert's opinion does not make that evidence admissible for other purposes, purposes independent of the opinion." 965 F.2d at 173 (citation omitted).

JRH's attempt to distinguish the Tenth Circuit's decision in *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722 (10th Cir. 1993), also fails. There, the issue was lost profits, and a "non-testifying expert" (Werber) had calculated sales projections that were relied upon by the "testifying expert" (Boswell). The Tenth Circuit rejected Boswell's testimony, emphasizing that the "expert" could not be used to prove facts necessary to the underlying claim. 993 F.2d at 732. The Tenth Circuit also recognized that allowing an expert to testify as to the underlying facts, and then allowing the adverse party an opportunity to cross-examine the expert, was improper as a means to admit the hearsay to prove its truth: "Dr. Boswell's lack of familiarity with the methods and the reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination of Dr. Boswell." *Id.* at 732-33. Similarly, here, Frazee had no first-hand knowledge of the underlying data upon which he relied and could offer no testimony as to its accuracy, thus precluding meaningful cross-examination.

JRH asserts erroneously that the Fifth Circuit's decision in *Viterbo v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987), follows the same approach as the court below. On the contrary, the court concluded in *Viterbo*: "Dr. Johnson's testimony is no more than Viterbo's testimony dressed up and sanctified as the opinion of an expert. Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." 826 F.2d at 424. Because of these deficiencies, the Fifth Circuit excluded the expert's opinion entirely and directed summary judgment in favor of the defendant. *Id.* at 425. Contrary to JRH's mischaracterization, the Fifth Circuit's decision in *Viterbo* illustrates only the depth of the conflict among the courts of appeals on the question presented. In this case, the court below

approved JRH's use of Frazee's testimony to establish that it had historic profits even though JRH simply told Frazee that "it is so." In *Viterbo*, the Fifth Circuit rejected this approach unequivocally.

None of the other cases that JRH cites or discusses, *see* Pet. Opp. at 25, undermine Adell's demonstration of a circuit conflict. For example, none involved the use of hearsay testimony, through an expert, to prove a necessary fact. *See Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000) (expert's methodology in assessing IQ at issue under *Daubert* analysis); *United States v. Elliott*, Case No. 94-10378, 1996 WL 380482 at *3 (9th Cir. July 5, 1996) (unpublished) (use of hearsay report in cross-examination); *Robinson v. Missouri Pac. R.R. Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994) (expert's qualifications and conclusions questioned); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 252 (5th Cir. 1990) (expert's conclusions -- confirmed by five additional witnesses -- were questioned).[2]

Moreover, one of the other cases that JRH cites -- *South Central Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015 (8th Cir. 1992) -- only illustrates further the conflict on the question presented. In *South Central*, the data on which the expert relied was disclosed and admitted into evidence at trial by way of a spreadsheet exhibit. 974 F.2d at 1019. The Eighth Circuit, however, allowed the data to explain the expert's conclusions, not to establish as true the underlying facts, stating: "When the district court admitted the exhibit, however, it limited the admission to the expert's opinion, and not to the underlying figures, as required by Federal Rule of Evidence 703." *Id.*

Second, in response to Adell's demonstration that the decision below follows the approach taken by the First Circuit in *International Adhesive*, JRH bizarrely mischaracterizes the First

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[2] Likewise, *Zayre Corp. v. SM&R Co.*, 882 F.2d 1145 (7th Cir. 1989), cited by JRH, is irrelevant. The portion of *Zayre* that JRH cites concerns the authentication of documents and summaries of documents under Fed. R. Evid. 803(6), 901(b)(9), and 1006. 882 F.2d at 1149; Pet. Opp. 8-9.

Circuit's approach as adhering to the rule that "a proponent of expert testimony cannot rely upon a hearsay fact to establish the truth of the fact through the expert." Pet. Opp. 24. Contradicting this very assertion, JRH also expressly concedes that the rule that the First Circuit follows is that a litigant may use the hearsay testimony of an expert to establish underlying facts, and that the hearsay nature of the testimony goes "to the weight of the testimony, not its admissibility; opposing counsel had the opportunity to expose any weakness through cross-examination." Pet. Opp. at 24 (citing *International Adhesive*, 851 F.2d at 545).

In *International Adhesive*, an expert testified regarding claimed losses, basing his opinion on business and financial records and interviews with personnel. 851 F.2d at 545. The defendant challenged the testimony, arguing that there was no documentary proof in the record to support any claimed losses. *Id.* Rather than require the plaintiff to demonstrate its *past* profits independent of the expert's opinion regarding *future* losses, the court mixed these two separate components of proof together, stating: "When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony -- a question to be resolved by the jury." 851 F.2d at 545. In doing so, the court allowed past profitability to be assumed as "built in" to the expert's opinion, which was itself based on hearsay.

Obviously, the First Circuit's approach is the same as the Sixth Circuit's approach in this case (which explains why the Sixth Circuit expressly relied on *International Adhesive* in its relevant holding in the decision below). In turn, the decision of the Sixth Circuit in this case and the decision of the First Circuit in *International Adhesive* both conflict with the decisions of numerous other courts of appeals on the question presented. Accordingly, certiorari is warranted.

### B. The Decision Below Conflicts With Prior Decisions Of This Court And Is Plainly Wrong.

JRH does not deny that Frazee's testimony concerning JRH's historic profit stream is classic hearsay. Nor does JRH deny that Frazee's testimony is inadmissible under Rule 802 to prove that JRH actually had any historic profits. Indeed, JRH has no response

*at all* to Adell's demonstration that the decision below conflicts with prior precedents of this Court and is plainly wrong. For this additional reason, certiorari is warranted.

### C. This Case Presents An Ideal Vehicle To Resolve The Conflict Among The Courts of Appeals.

Finally, JRH's suggestion that resolution of the question presented is not outcome-determinative is also wrong. JRH suggests that, even if Frazee's testimony is inadmissible, JRH otherwise proved the existence of its historic profits through Shekerjian's testimony. This response fails for two reasons.

First, the Sixth Circuit plainly did not accept JRH's argument. After independently reviewing the entire record, the court concluded that "[h]ad JRH had an independent need to prove the past profits . . ., the present record might be inadequate." Pet. App. 29a. The court, however, avoided holding that JRH failed to meet its burden on the existence of past profits by applying the legal rule that, once Frazee testified on this issue, the burden shifted to Adell to disprove the facts underlying Frazee's testimony. If JRH had truly established its past profits through Shekerjian's testimony (or in some other way), the Sixth Circuit would have ruled accordingly and avoided completely the controversy over the inadequacy of Frazee's testimony on this issue. The court did not do so, however, suggesting only that the record demonstrates that JRH did not offer any other evidence to support its claim of past profits.

Second, the record clearly demonstrates that JRH did not, in fact, offer additional testimony to fill the evidentiary void on claimed past profits. In tacit recognition of the weakness of its assertion that it did, JRH only half-heartedly argues that Shekerjian's testimony proved its historic profits, rendering harmless the inadmissibility of Frazee's testimony. Pet. Opp. 4. At most, however, Shekerjian testified regarding "historic" figures only in the most vague and cursory fashion. Critically, his testimony did not mention, let alone establish, *any* past earnings figures, profits, or profit margins, or any relevant financial basis for determining whether JRH was ever profitable in any sense. Tellingly, JRH does not provide a single record citation to demonstrate that Shekerjian actually even mentioned in passing

what JRH's profits were at any point in time, let alone the basis for any such conclusion. In fact, the record demonstrates that Shekerjian's testimony at trial amounted to nothing more than such statements as "Yeah, I believe so" in response to leading questions from JRH's attorney regarding *Frazee's* testimony. *See* Apx. 0635 (*Q*: "Is the 17 percent margin that Mr. Frazee projected . . . consistent with your own experience . . . ?" *A*: "Yeah, I believe so." *Q*: "And that's based on what?" *A*: "Historical information. I mean, just, you know, 20 years in the business . . . ."); Apx. 0668 ("I – I wasn't involved in that aspect of it. I'm not in the accounting side of the business at all."). Shekerjian's testimony is wholly insufficient to prove unmentioned past profits, and the sheer length of JRH's discussion of his testimony cannot hide its lack of substance.

JRH cannot avoid certiorari on the basis of an unfounded assertion regarding Shekerjian's testimony that the court below did not accept or decide, and that the record does not support. *See Cooper Indus., Inc. v. Aviall Servs.*, Inc., 543 U.S. 157, 168-69 (2004) ("'We ordinarily do not decide in the first instance issues not decided below.'") (quoting *Adarand Constr., Inc. v. Minetta*, 534 U.S. 103, 109 (2001). At the very most, the question whether JRH met its burden of demonstrating the existence of past profits other than through Frazee's testimony would be an issue for remand. JRH's assertion offers no basis to refute the clear conflict among the courts of appeals on the question presented, or the clear error of the court below in accepting Frazee's hearsay testimony to satisfy JRH's burden on the issue whether JRH *actually had* any historic profits that it claims it lost.

## CONCLUSION

For the foregoing reasons, together with those set forth previously, Petitioner respectfully requests that the Court issue a writ of certiorari in this case.

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